

P.K. MUI TE, S.C
Advocate

Chaka Apartments, Chaka Road, Off Arwings Khodek Rd.
Suite No. 5
Nairobi
Tel: 0711 181 713

P.O. Box 14746-00100
Tel: 254-20-2730630
Fax: 254-20-2730631
e-mail - peca@wananchi.com

8th April, 2009

Louis Moreno Ocampo
Prosecutor
International Criminal Court
Post Office Box 19519
2500 CM The Hague
The Netherlands

Dear Mr. Ocampo

EXTRA JUDICIAL EXECUTIONS IN KENYA

I am a practising lawyer in Nairobi holding the rank of Senior Counsel and a past Chairman of the Law Society of Kenya. I have also served as Member of Parliament for three five year terms, 1992 to 2007.

I have been actively involved in human rights issues in Kenya and was in the fore front in the struggle for the “second liberation” which returned Kenya to a multi party democracy in 1991 after decades of the single party “KANU” rule during which gross violations of human rights occurred.

From about 2006, when one Hon. John Michuki was the Minister of State in the Office of the President in charge of internal security, there emerged a pattern of extra judicial executions of young men from central Kenya, the ethnic home of the current President, H.E. Mwai Kibaki. The victims were said to be members of an outlawed organisation “mungiki”, itself alleged to carry out orgies of violence.

I was one of the first public figures to strongly condemn these extra judicial executions. My position then and now was that extra judicial executions are inexcusable under any circumstances in a country purporting to be governed by the rule of law. Suspects, including members of criminal gangs are entitled to due process. They should be apprehended and arraigned in court. It is for courts of justice to pronounce on their guilt or innocence. If the judiciary is the problem as has sometimes been claimed by the Kenyan Police as the reason for the extra judicial executions, the solution is to fix the judiciary through institutional reforms.

My consistent stand on extra judicial executions must have rubbed those to whom fingers point the wrong way, particularly after the recent investigations by Professor Philip Alston.

Allow me to draw your attention to Article 28(b) of the Rome Statute, the provisions of which you are familiar with, which states and I quote:-

“With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

..... 3

In the Kenyan case, the criminal responsibility for extra judicial executions falls on the President of the Republic of Kenya, H.E. Mwai Kibaki, his Ministers in his office in charge of internal security and especially the Hon. John Michuki who was the minister in 2006 when this policy of extermination was put in place, the Commissioner of Police, the Director of Intelligence “NSIS” and the Commanders of these extra judicial execution squads.

I hereby formally and humbly request you to invoke Article 28(b) of the Rome Statute and order investigations into the extra judicial executions in Kenya including the possible involvement of those mentioned above.

The large number of victims and the long period over which the extra judicial executions have been and continue to take place suggest a policy decision on the matter. A policy of extermination on this scale could not possibly be formulated without clearance from the Chief Executive, the President. In any event, the President cannot feign ignorance over the extra judicial executions. He reads newspapers, watches television, listens to FM radio stations and receives briefings from the Intelligence Agencies and the Police all of whom are in fact directly under himself in his office, the office of the President.

I am aware that a number of Non Governmental Organisations in Kenya have forwarded to you detailed reports of the specifics of these extra judicial executions. Most recently, the United Nations Special Rapporteur on Extra Judicial Executions, Professor Philip Alston, forwarded his report to you after his investigations in Kenya on this issue.

I would like to highlight two cases which underscore the gravity and urgency of the need for action by your office on this issue of extra judicial executions in Kenya and the attendant impunity and arrogance of those involved.

1. Bernard Kiriinya, a Police Officer who spilled the beans to The Kenya National Commission on Human Rights was himself extra
..... 4

